No. 405

SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
AUG 23 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 405

JOHN W. TURNER, JR.,

Appellant,

vs.

WARREN E. WRIGHT, TREASURER OF THE STATE OF ILLINOIS AND RICHARD J. LYONS, DIRECTOR OF THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS;

Appellees.

STATEMENT AS TO JURISDICTION

AMOS M. MATHEWS,
280 Union Station Building,
Chicago, Illinois.

JEROME F. DIXON,
231 S. La Salle St.,
Chicago, Illinois.

MICHAEL M. PHILLIPS,
105 W. Adams St.,
Chicago, Illinois.

Attorneys for Appellant.

PAGE

Citation to opinion below 2
Jurisdiction 2
Questions Presented 3
Statement of the Case 4
I. Facts material to the consideration of the questions presented 4
(A) The nature of Illinois' unique use tax .. 7
(B) The complaint 7
(C) Defendants' defensive pleading 10
II. State in proceedings in court of first instance when federal questions sought to be reviewed were raised. Method of raising questions and how passed upon 10
III. The federal questions are substantial 14
(A) The nature of the case and the rulings of the court bring the case within the jurisdiction of the provisions relied on .. 14
(B) The federal questions relating to the validity of Section 9 of the use tax act is substantial 15
(C) The federal questions relating to the validity of Section 3 is substantial 19
(D) If either Sec. 9 or Sec. 3 be held unconstitutional, then the entire act must fall. 24

TABLE OF CASES

A.B.C. Electrotype Co. v. Ames, 364 Ill. 360, 1936 19
Abie State Bank v. Bryan, 282, U.S. 765, 1931 .....3, 15
Ahern v. Nudelman, 374 Ill. 237; 1940 5
A. Magnano Co. v. Hamilton, 292, U.S. 40, 1934 18
Automatic Voting Machine Co. v. Daley, 409 Ill. 438, 1951 .....5, 17
Babcock v. Nudelman, 367 Ill. 626, 1937 19
Berea College v. Kentucky, 211 U.S. 45, 1908 24

PAGE
Brevoort Hotel v. Ames, 360 Ill. 485, 1935 5
Burgess v. Ames, 359 Ill. 427, 1936 19
Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 1937 18
Chicago, B. and Q. R. Co. v. Chicago, 166 U.S. 226, 1896 ..... 3, 15
Citizens Savings & Loan Asso. v. Topeka, 20 Wall., 655, 1875 17
City of Parkersburg v. Brown, 106 U.S. 487, 1883 18
Cole v. La Grange, 113 U.S. 1, 1885 18
Colgate v. Harvey, 296 U.S. 404, 1935 24
Economy Auto Insurance Co. v. Brown, 334 Ill. App. 579, 1948 10
Erie Railroad v. Purdy, 185 U.S. 226, 1901 ..... 3, 15
Franklin County Coal Co. v. Ames, 359 Ill. 178, 1935 5
Grand River Dam Authority v. Grand Hydro, 335 U.S. 359, 1948 ..... 3, 15
Green v. Frazier, 253 U.S. 233, 1920 17
Henneford v. Silas Mason Co., 300 U.S. 577, 1937 ..... 16, 22
Illinois v. Board of Education, 333 U.S. 203, 1947 3
Ingersoll v. Nudelman, 405 Ill. 367, 1950 19
James Stewart and Co. v. Sadrakula, 309 U.S. 94, 1940 ..... 3, 14
Johnson v. Halpin, 413 Ill. 257, 1952 8
Mahon v. Nudelman, 377 Ill. 331, 1941 19
Mallen Co. v. Department of Finance, 372 Ill. 598, 1940 19
Miller Bros. v. Maryland, 347 Ill. 346, 1954 21
Nelson v. Sears Roebuck and Co., 312 U.S. 359, 1941 ..... 16, 22
Pease v. Kendall, 391 Ill. 193, 1945 10
People's Drug Shop v. Moysey, 384 Ill. 283, 1943 17
Reconstruction Finance Corporation v. Beaver County, 328 U.S. 204, 1946 ..... 3, 14
Revzan v. Nudelman, 370 Ill. 180, 1938 19
Sluis v. Nudelman, 376 Ill. 457, 1941 5
Southern Pacific Co. v. Gallagher, 306 U.S. 167, 1939 ..... 16, 22
Svithiod Singing Club v. McKibbin, 381 Ill. 194, 1942 19
Swain v. Hoberg, 380 Ill. 442, 1942 12

PAGE

Swain Nelson and Sons Co. v. Department of Finance, 365 Ill. 401, 1937 5
Thompson v. Consolidated Gas Co., 300 U.S. 55, 1937 .. 18
Turner v. Wright, 11 Ill. (2) 161 2
United States v. Butler, 297 U.S. 1, 1935 17

STATUTES

The following Illinois statutes, from the 1955 edition of the Illinois Revised Statutes, being the most recent edition in circulation at the time of the preparation of this jurisdictional statement:*

Secs. 172, 172-A Ch. 127 2
Sec. 441-A Ch. 120 5
Sec. 441 Ch. 120 5
Sec. 439.6 Ch. 120 16
Sec. 439.10 Ch. 120 6
Sec. 101.36 (2) (A) Ch. 110 12
Sec. 441 Ch. 120 19
Sec. 57.1 Ch. 110 2
Sec. 72.26 Ch. 37 2
Sec. 101.39 (1) Ch. 110 12
Sec. 101.39 Ch. 110 12
Sec. 439.7 Ch. 120 16

*Because of the numerous references to Sec. 3 and 9 of the Illinois use tax act, references to those sections have been omitted.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No.

JOHN W. TURNER, JR.,

Appellant,

vs.

WARREN E. WRIGHT, TREASURER OF THE STATE OF ILLINOIS AND RICHARD J. LYONS, DIRECTOR OF THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,

Appellees.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

STATEMENT AS TO JURISDICTION

In compliance with Rules 13, and 15 of this Court appellant herewith submits this statement particularly disclosing the basis upon which this court has jurisdiction on appeal to review the judgment of the Supreme Court of Illinois. The judgment was entered on March 20, 1957. (R. 48.) (See Appendix A for judgment.) Appellant filed a petition for rehearing which was denied by the Illinois Supreme Court on May 20, 1957. (R. 51.) Notice of appeal to this court was filed in the Illinois Supreme Court July 17, 1957. (R. 54.)

OPINIONS BELOW

There were two opinions by the Illinois Supreme Court in this case. The first at the November 1956 term held the Illinois use tax act unconstitutional without dissent by any member of the court. (R. 15-23.) (See Appendix B for copy of opinion.) The second opinion given at the March, 1957 term, after the granting of a rehearing to appellee, held the act constitutional, with one judge dissenting. (R. 45-53.) Copies of that opinion and the dissenting opinion are hereto attached as Appendix C. The opinion is reported in 11 Ill. (2) 161, 142 N.E.(2) 84.

NATURE OF PROCEEDING

This is a suit for (1) declaratory judgment and (2) injunction brought by a citizen and taxpayer of Illinois to determine the validity of the Illinois use tax act. The suit originated in the Circuit Court of Cook County, Illinois. The declaratory judgment count of the complaint was brought under the provisions of Sec. 57.1 Ch. 110 Illinois Revised Statutes, 1955. The count for injunction was brought under the provisions of Secs. 172, 172-A Ch. 127 and Sec. 72.26 Ch. 37 Illinois Revised Statutes, 1955. The Circuit Court of Cook County held the act in question did not violate either the constitution of Illinois or the constitution of the United States, and entered a final decree sustaining appellees' motion to dismiss. (Abs. 23.) The Illinois Supreme Court held the act constitutional and affirmed the Circuit Court decree. Appellant then filed a petition for rehearing which the court denied. (R. 51.)

STATUTORY BASIS FOR JURISDICTION

The jurisdiction of this court to review on appeal the judgment of the Illinois Supreme Court is conferred by 28 U.S.C. Sec. 1257 (2).

CASES SUSTAINING JURISDICTION

Cases which sustain the jurisdiction of this court to entertain the appeal from the judgment of the Illinois Supreme Court are *James Stewart and Co.* v. *Sadrakula*, 309 U.S. 94, 1940; *Illinois* v. *Board of Education*, 333 U.S. 203, 1947; *Reconstruction Finance Corp.* v. *Beaver County*, 328 U.S. 204, 1946; *Chicago B. and Q. R. Co.* v. *Chicago*, 166 U.S. 226, 1896; *Erie Railroad* v. *Purdy*, 185 U.S. 226, 1901; *Grand River Dam Authority* v. *Grand Hydro*, 335 U.S. 359, 1948; *Abie State Bank* v. *Byron*, 282 U.S. 765, 1931.

THE ILLINOIS USE TAX ACT

The Illinois Use Tax Act is to be found in Secs. 439.1-439.18 Ch. 120 Vol. II pages 816-820, Illinois Revised Statutes, 1955. Its provisions pertinent to this appeal are set forth in Appendix D hereto attached.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

(1) Whether Sec. 9 of the Illinois use tax act (Sec. 439.9 Ch. 120, page 818 Vol. II, Illinois Revised Statutes, 1955) in permitting the retention by a retailer of the tax provided for in said act is a gift of public funds for a private purpose and is a deprivation of private property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

(2) Whether Sec. 3 of the aforesaid act (Sec. 439.3 Ch. 120, page 817 Vol. II, Illinois Revised Statutes, 1955) in exempting from the payment of taxes under the act all purchasers of personal property at retail whose sellers are exempt from the tax imposed by the Illinois retailers' occupation tax act (Secs. 440-453 Ch. 120, pages 820-831 Vol. II, Illinois Revised Statutes, 1955) is a void and discriminatory classification in violation of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

I.

FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

A.

THE NATURE OF ILLINOIS' UNIQUE USE TAX

Twenty-eight other states have use tax acts. The Illinois act is unique. In most of the states an exemption is given from the use tax where a purchase is made within the state imposing the tax. In the few that do not grant outright exemptions, the tax is only due upon a domestic purchase if the local sales or retailers' tax is not paid. (See Appendix E attached for a digest of use tax acts of other states relating to exemptions.)

The Illinois use tax act is unique in two respects, viz.:

(1) There are two taxes rigidly due on all sales of tangible personal property at retail made within the state, the retailers' tax and the use tax. No exemption from the use tax is given in the case of a purchase within the state as do most of the states. Neither is the use tax only due when the retailers' tax is not paid as in the case of those states that do not grant outright exemptions.

(2) In the case of all purchases made within the state, Illinois retailers are the collectors of the tax and retain it as their own. The state does not receive it. The foregoing aspects of the act in question will be more fully discussed later.

In order to fully comprehend the nature of the Illinois use tax, the following observations should first be made as to the Illinois retailers' tax act.

Since 1933 Illinois has had a tax upon retailers measured by the gross receipts from sales (Sec. 441 Ch. 120, p. 821 Vol. II, Illinois Revised Statutes, 1955).*

All retailers must obtain certificates of registration from the Department of Revenue (Sec. 441-A Ch. 120, p. 822 Vol. II, Illinois Revised Statutes, 1955). The retailers' tax is upon the occupation of selling tangible personal property at retail (Sec. 441 Ch. 120, p. 821 Vol. II, Illinois Revised Statutes, 1955). It is an occupation tax upon retailers and not a sales tax. (*Automatic Voting Machine Corp.* v. *Daley*, 409 Ill. 438-447, 1951.) It is a wide tax upon retailers who sell every conceivable type of tangible personal property of whatsoever nature.**

There are certain instances in which the retailers' act does not apply, hereinafter referred to. *That however has to do with the occupation of the seller and not to the type or nature of property he sells.*

The use tax act is equally as sweeping as the retailers' act in so far as the nature or type of personal property

---

* The editor of the Illinois Revised Statutes carries the section numbers of the revised statutes in dark type and the actual section numbers of the respective acts in light type immediately following each section number of the revised statutes. For example, Sec. 441 Ch. 120, Illinois Revised Statutes is Section 1 of the retailers' act. Sec. 439.3 Ch. 120 Illinois Revised Statutes is Sec. 3 of the use tax act. Sec. 439.9 Ch. 120 Illinois Revised Statutes is Sec. 9 of the use tax act.

** The retailers' tax is not limited to those keeping stores or disposing of tangible personal property in small quantities. (*Franklin County Coal Co.* v. *Ames*, 359 Ill. 178-183, 1935.) Neither is there any limit from the tax as to the nature of the tangible personal property sold. It includes those who sell every conceivable kind of tangible personal property as for example food (*Brevoort Hotel* v. *Ames*, 360 Ill. 485, 1935), coal (*Franklin County Coal Co.* v. *Ames*, 359 Ill. 178, 1935), shrubs and nursery stock (*Swain Nelson and Sons* v. *Department of Finance*, 365 Ill. 401, 1937), seeds sold to farmers (*Sluis* v. *Nudelman*, 376 Ill. 457, 1941) and caskets and grave clothing sold by undertakers (*Ahern* v. *Nudelman*, 374 Ill. 237, 1940).

is purchased at retail that subjects the purchaser to the tax. The tax is upon the use of all tangible personal property purchased at retail (Sec. 439.3 Ch. 120, p. 817 Vol. II, Illinois Revised Statutes, 1955) and, as in the case of the retailers' act, it admits of no exceptions so far as the type or nature of the tangible personal property is concerned. The exemption, hereinafter referred to, depends solely upon whether the property was purchased from a retailer as defined by the retailers' act.

The use tax is imposed upon all purchasers whether they buy within or without the state. An Illinois retailer having a certificate of registration under the retailers' act need not register under the use tax act. (Sec. 439.6 Ch. 120, p. 818 Vol. II Illinois Revised Statutes, 1955.) The Department of Revenue may permit a retailer without a place of business in Illinois to register under the use tax act as a retailer (*ibid.*). Where a purchaser buys from a retailer with a registration certificate (either a retailer with a place of business in Illinois or a non-resident with an Illinois certificate) the retailer is required to collect the use tax (Sec. 439.3 Ch. 120, p. 817 Vol. II, Illinois Revised Statutes, 1955) and remit it to the Department of Revenue to the extent that he is required to remit (Sec. 439.9 Ch. 120, p. 818 Vol. II, Illinois Revised Statutes, 1955). The tax imposed by the act and not paid to an Illinois retailer or to a non-resident retailer with an Illinois certificate shall be paid to the Department of Revenue, "directly by any person using such property within this state." (Sec. 439.3 Ch. 120, p. 817 Vol. II, Illinois Revised Statutes, 1955.) Where tangible personal property is purchased from a retailer for use in Illinois by one who did not pay the tax to a retailer, he is required to file a return with the Department of Revenue and pay the tax not later than the 15th day of the next calendar month after the tax is due. (Sec. 439.10 Ch. 120, p. 819 Vol. II, Illinois Revised Statutes, 1955.)

Sec. 9 of the act, the validity of which is in issue here, requires a retailer to remit the use tax to the Department of Revenue on the 15th of each calendar month after which it was collected by him beginning September 15, 1955, "But a retailer need not remit that part of any tax collected by him to the extent that he is required to remit and does remit the tax imposed by the Retailers' Occupation Tax Act with respect to the sale of the same property." (Sec. 439.9 Ch. 120, p. 818 Vol. II, Illinois Revised Statutes, 1955.)

Sec. 3 of the act, the validity of which is also in issue here, gives the exemptions. The particular exemption challenged here provides that, "If the seller of tangible personal property for use would not be taxable under the Retailers' Occupation Tax Act despite all the elements of a sale occurring in Illinois, then the tax imposed by this act shall not apply to the use of such tangible personal property in this state." (Sec. 439.3 Ch. 120, p. 817 Vol. II, Illinois Revised Statutes, 1955.)

B.

THE COMPLAINT

The complaint is in the abstract of record of the Circuit Court of Cook County filed in this case in the Illinois Supreme Court upon the appeal from the Circuit Court of Cook County to the Illinois Supreme Court. The abstract of record has been appended by the Clerk of the Illinois Supreme Court to page 3 of the record certified by the Clerk of the Illinois Supreme Court and filed herein upon the within appeal from the Illinois Supreme Court to the Supreme Court of the United States. All references to pages of the abstract of record are given as "Abs."

As previously shown the complaint is one for (1) declaratory judgment and (2) for injunction and raised the

validity of Sections 3 and 9 of the act in question under the Fourteenth Amendment to the United States Constitution. The suit was brought by plaintiff in his own behalf and also as a representative suit on behalf of all taxpayers similarly situated. In Illinois the practice of a taxpayer bringing a declaratory judgment proceeding and an injunction suit in his own behalf and also as a representative proceeding on behalf of all other taxpayers wherein the validity of a revenue act is drawn in question is approved practice. (*Johnson* v. *Halpin*, 413 Ill. 257-261, 1952.)

The complaint may be summarized as follows:

Plaintiff is a citizen, resident and taxpayer of Illinois. Defendant Warren E. Wright is Treasurer of Illinois. (Abs. 2.) Defendant Richard J. Lyons is Director of the Department of Revenue of Illinois. (Abs. 2.) On August 1, 1955 plaintiff purchased a motor vehicle in Indiana for his own use in Illinois and not for resale. (Abs. 2.) The Indiana seller is a retailer as defined by the use tax act but has no place of business in Illinois or an Illinois retailer's license authorized for the collection of the use tax. (Abs. 2.) Plaintiff paid no tax in Indiana with respect to the sale, use or possession of the motor vehicle. Under the provisions of the use tax act a tax is due from plaintiff to Illinois which he has paid under protest as provided by an act of the Illinois General Assembly in such case made and provided. (Abs. 3.) Section 9 of the act in providing that a retailer need not remit any part of the tax collected by him to the extent that he remits the tax imposed by the retailers' act makes a gift of public funds for a private purpose in violation of the Fourteenth Amendment to the United States Constitution and is therefore unconstitutional. (Abs. 6-7.) The act discriminates in favor of purchasers at retail from persons engaged in service occupations in that such persons are not required to pay

the tax imposed by the act. (Abs. 15.) In this the act is discriminatory in violation of the Fourteenth Amendment to the Constitution of the United States. (Abs. 15.) The act being unconstitutional in its entirety, there is no valid tax that may be imposed under its terms. Defendant Lyons is without lawful authority to collect the tax or administer the act. (Abs. 8-9.) Nevertheless said defendant is unlawfully administering the act and unlawfully claims a tax is due from plaintiff and all other persons who are not retailers as defined by the act who have since August 1, 1957 and will thereafter purchase tangible personal property for use in Illinois who by the terms of the act are given no exemption. (Abs. 9.) A controversy therefore exists between plaintiff and said defendant. Such controversy will not be resolved until there has been a final judicial determination whether the act is constitutional and whether the Department of Revenue can lawfully claim or collect the tax and otherwise lawfully administer the act. (Abs. 9.) There are numerous persons similarly situated as plaintiff who have since August 1, 1955 and will thereafter purchase tangible personal property for use in Illinois and are given no exemption from the act. (Abs. 10.) All members of the class have a common interest with plaintiff in the questions involved in the proceeding and the results sought. (Abs. 10.)

The declaratory judgment count of the complaint prayed for the entry of a declaratory judgment that the court declare that (1) the act is unconstitutional, (2) that defendant Lyons has no authority to enforce or administer the act and (3) that neither plaintiff nor the class represented by him are obliged to pay or owe any tax under the act. (Abs. 10.)

The injunction count of the complaint prayed that defendant Lyons be enjoined from enforcing the act against plaintiff or any members of the class represented by him;

and that defendant Wright be enjoined from transferring the tax paid by plaintiff under protest into the general treasury fund and requiring said defendant to refund plaintiff an account of the tax so paid under protest. (Abs. 12-13.)

C.

DEFENDANTS' DEFENSIVE PLEADING

Defendants' defensive pleading in the Circuit Court of Cook County consisted of a motion to strike and dismiss the complaint, taking issue with plaintiff as to whether Sections 9 and 3 of the act in question violate the Fourteenth Amendment to the United States. (Abs. 16-23.) In Illinois such a motion admits all facts in a complaint well pleaded, (*Pease* v. *Kendall*, 391 Ill. 193-197, 1945) and raises an issue of law (*Economy Auto Insurance Co.* v. *Brown*, 334 Ill. App. 579-585, 1948).

II.

STAGES IN PROCEEDINGS IN COURT OF FIRST INSTANCE WHEN FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED. METHOD OF RAISING QUESTIONS AND HOW PASSED UPON.

The validity of Sec. 9 of the act in question under the Fourteenth Amendment to the Constitution of the United States was raised in Par. VI of the complaint in this case filed in the Circuit Court of Cook County (Abs. 6-7) and is quoted in the footnote.*

---

* "VI. Section 9 of the Act provides that a retailer need not remit any part of a tax collected by him to the extent that he remits the tax imposed by the Retailers' Occupation Tax Act with respect to the sale of the same property. In this the Act violates Sec. 20 of Article IV of the constitution of the State of Illinois in that it makes a gift of public funds for a private purpose and it violates Sec. 2 of Article II of the constitution of the State of Illinois and the Fourteenth Amendment to the constitution of the United States in that it takes property without due process of law; And it violates Section 23 of Article IV of the constitution of the State of Illinois in that it releases or extinguishes the indebtedness, liability, and obligations of corporations and individuals to the State of Illinois; And it violates Section 22 of Article IV of the constitution of the State of Illinois and the Fourteenth Amendment to the constitution of the United States in that it is a special law and it grants special privileges, franchises and immunities to corporations, associations and individuals."

The validity of Sec. 9 of the act in question was argued at p. 3 of appellant's brief in the Illinois Supreme Court which has been certified here with the record (R. 9) and is quoted in the footnote.*

The validity of Sec. 3 of the act in question under the Fourteenth Amendment to the Constitution of the United States was raised in Par. IX of the complaint in this case filed in the Circuit Court of Cook County (Abs. 15) and is quoted in the footnote.**

The validity of Sec. 9 of the Act in question was argued at p. 28 and p. 34 of appellant's brief in the Illinois Supreme Court (R. 9) quoted in the footnote.***

---

* "Sec. 9 of the act allows a retailer collecting the use tax for the state to retain it as his own and the tax never reaches the state treasury. As a consequence non-taxpayers are the sole beneficiaries of the taxes paid by taxpayers. It is a violation of the due process of law provisions of the state and federal constitutions to take a citizen's money from him under the guise of taxes and then refund it to one who was not the taxpayer."

** "IX. The act discriminates in favor of purchasers at retail from persons engaged in service occupations in that such purchasers are not required to pay the tax imposed by the act for the reason that Sec. 3 of the act provides that if the seller of tangible personal property would not be taxable under the Retailers' Occupation Tax Act then the tax imposed by this act shall not apply to the use of such property. In this the act is discriminatory in violation of the Fourteenth Amendment to the United States Constitution, and Section 2 of Article II and Section 22 of Article IV of the Illinois Constitution; and is not uniform as to the class upon which it operates in violation of Section 1 of Article IX of the Illinois Constitution."

*** "We maintain that the imposition of the tax upon the class in question has no reasonable basis and clearly violates the uniformity clause (Sec. 1, Art. IX), Sec. 2, Art. II and Sec. 22, Art. IV of the Illinois Constitution and the Fourteenth Amendment to the United States Constitution."

"We submit that the Use Tax Act for the reasons given, is discriminatory and not uniform as to class; under the decisions cited, it violates the uniformity clause of Sec. 1, Art. IX, Sec. 2, Art. II and Sec. 22, Art. IV of the Illinois Constitution and the Fourteenth Amendment to the United States Constitution."

No assignment of error was filed in the Illinois Supreme Court for the reason that Illinois Supreme Court rules dispense with the filing of an assignment of errors either in the record (Sec. 101.36 (2) (a) Ch. 110, p. 536 Vol. II, Illinois Revised Statutes, 1955, "no assignment of errors or cross errors is necessary") or in the briefs (Sec. 101.39 (1) Ch. 110, p. 537 Vol. II, Illinois Revised Statutes, 1955, "Neither an assignment or statement of errors is necessary"). In Illinois Supreme Court practice an appeal is not a new proceeding but is a continuation of the proceeding in the court from which the appeal was taker (*Swain* v. *Hoberg*, 380 Ill. 442-446, 1942.) Until January 1, 1956 the concluding subdivision of the statement of the case of a brief was required to state the errors relied upon for reversal; but that was regarded as nonjurisdictional. (*Swain* v. *Hoberg*, 380 Ill. 442-446, 1942.) This appeal was taken to the Illinois Supreme Court by filing notice of appeal April 11, 1956. Since January 1, 1956, the provision requiring a brief to state the errors relied upon for reversal has been dispensed with. (Sec. 101.39 Ch. 120, p. 537 Vol. II, Illinois Revised Statutes, 1955.) In Illinois Supreme Court practice an appellant can raise any question clearly appearing to have been raised in his brief. (*Swain* v. *Hoberg*, 380 Ill. 442-446, 1942.)

The Circuit Court of Cook County, in the final decree from which the appeal was taken to the Illinois Supreme Court, sustained defendant's motion to strike and dismiss, found that the act in question "does not violate the Constitution of the State of Illinois or the Constitution of the United States" (Abs. 24) and dismissed plaintiff's suit. (Abs. 24.)

The opinion of the Illinois Supreme Court (R. 38) recited

the issue as to the validity of Sec. 9 of the act in question as quoted in the footnote.*

and held it constitutional (R. 38) as quoted in the footnote.**

The opinion of the Illinois Supreme Court recited the issue as to the validity of Sec. 3 of the act in question (R. 39-40) as quoted in the footnote;***

---

* "The act requires the Illinois retailer to collect the use tax upon the sales he makes. It does not require him to remit that tax to the State, however, to the extent that he remits the retailers' occupation tax with respect to the sale of the same property. (Section 9) Plaintiff also contends that this set-off provision provides for a gift of public funds to private individuals, permits the commutation of taxes and provides for the cancellation of a debt due to the state, all in violation of the constitution. Const. Art. IX, Secs. 6 and 7; Art. IV, Sec. 23."

** "It is true that the scheme of this tax is more complex than that of a use tax that falls only on out of state purchases. But its purpose and its results are those of the typical use tax, and the formal differences in the method by which those purposes are accomplished do not affect the validity of the statute.

It is not intended that both taxes shall reach the treasury with respect to a single transaction. It is intended and provided that one tax, and only one, shall reach the State Treasury with respect to each purchase of property for use within the state, whether or not the purchase is made within Illinois."

*** "The exemption provisions of the act are also attacked. The use tax act falls on 'the privilege of using in this state tangible personal property purchased at retail—from a retailer.' The basic terms employed in the Use Tax Act are those used in the Retailers' Occupation Tax Act and, except in the instance just discussed, they are so defined as to make the scope of the two acts the same. In addition, Section 3 of the Use Tax Act contains the following provision designed to limit the impact of the tax to those transactions that would measure a tax under the Retailers' Occupation Tax Act: 'If the seller of tangible personal property for use would not be taxable under the Retailers' Occupation Tax Act despite all the elements of the sale occurring in Illinois, then the tax imposed by this Act shall not apply to the use of such tangible personal property in this state.'"

and held it constitutional (R. 40) as quoted in the footnote.*

III.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

A.

THE NATURE OF THE CASE AND THE RULINGS OF THE COURT BRING THE CASE WITHIN THE JURISDICTIONAL PROVISIONS RELIED ON.

We have previously shown that the validity of an Illinois statute was drawn in issue in the Circuit Court of Cook County and in the Illinois Supreme Court on the grounds of its being repugnant to the Fourteenth Amendment to the United States Constitution. Both courts sustained the validity of the statute, which therefore gives this court jurisdiction. (*James Stewart and Co.* v. *Sadrakula*, 333 U.S. 203, 1947; *Reconstruction Finance Corp.* v. *Beaver County*, 328 U.S. 204, 1946.)

The validity of Sections 9 and 3 of the act in question under the Fourteenth Amendment to the Constitution of the United States was not mentioned in the opinion of the Illinois Supreme Court, although the validity of the two sections under the Fourteenth Amendment was drawn in issue in both the trial court and in the Supreme Court and is therefore subject to review in this appeal. Mere failure of the opinion of the highest court of a state to refer to an issue raised in that court under the United States Constitution will not defeat the jurisdiction of this court where the state court's judgment of affirmance necessarily

---

* "But the tax before us does not stand alone. The purpose of the use tax is to protect the base of the retailers' tax and the classification adopted is reasonably directed to this end."

denied the federal rights claimed by the appellant. (*Chicago B. and Q. R. Co.* v. *Chicago*, 166 U.S. 226-231-232, 1896.) So long as the federal question was properly raised in the state court, silence in the opinion of the court as to the presence of the issue will not preclude the appellant from raising it here. (*Erie Railroad* v. *Purdy*, 185 U.S. 226-231-232, 1901.) The fact that the highest court of a state purports to rest its decision largely on state law does not eliminate the duty of this court to consider an issue to the extent that it arises under federal law; and it is for this court to determine whether the federal issue was necessarily, although only impliedly, adjudicated by the state court. (*Grand River Dam Authority* v. *Grand-Hydro*, 335 U.S. 359-369-370, 1948.)

Here the validity of the sections of the act in question was challenged both under the state constitution and the federal constitution so that the Illinois Supreme Court could not have rested its decision upon state grounds only. It must have based its decision upon federal grounds as well as state grounds in order to hold the act in question constitutional and the jurisdiction of this court is therefore plain. (*Abie State Bank* v. *Bryan*, 282 U.S. 765-773, 1931.)

B.

THE FEDERAL QUESTION RELATING TO THE VALIDITY OF SECTION 9 OF THE USE TAX ACT IS SUBSTANTIAL.

As previously shown where a purchase is made from a seller without a certificate of registration under the retailers' act or use tax act, the purchaser pays the use tax directly to the Department of Revenue. This occurs only in case of a purchase made outside Illinois from a seller without an Illinois use tax certificate of registration. It could not occur in case of an Illinois sale because all Illinois retailers must have certificates under the retailers' act.

In all cases where a purchase is made from a retailer having a certificate of registration under the retailers' act or use tax act, the tax is paid by the purchaser to the retailer. (Sec. 439.3 Ch. 120, p. 817 Vol. II, Illinois Revised Statutes, 1955.) The act makes it unlawful for a retailer to assume or absorb the tax himself. (Sec. 439.7 Ch. 120, p. 818 Vol. II, Illinois Revised Statutes, 1950.) He is thus compelled to collect the use tax in case of every sale where the tax is due.

We have already shown that where a purchase is made in Illinois, there is also a retailer's tax upon the same transaction. Sec. 9 of the use tax act, the validity of which is drawn in issue here, while requiring a retailer to remit the use tax to the Department of Revenue, then further provides that "a retailer need not remit that part of any tax collected by him to the extent that he is required to remit and does remit the tax imposed by the Retailers' Occupation Tax Act with respect to the sale of the same property." (Sec. 439.9 Ch. 120, p. 818 Vol. II, Illinois Revised Statutes, 1955.) Since a non-resident retailer without a place of business in Illinois who voluntarily registers under the use tax act (Sec. 439.6 Ch. 120, p. 818 Vol. II, Illinois Revised Statutes, 1955) is not subject to the Illinois retailers' act as to sales without the state, no tax is due from him under the retailers' act and he cannot avail himself of the set-off provisions of Sec. 9. He must pay the full amount of use taxes collected to the Department of Revenue. Thus, only a retailer transacting business in Illinois is able to avail himself of the set-off provisions of Sec. 9.

This court has sustained use tax acts of other states. (*Southern Pacific Co.* v. *Gallagher*, 306 U.S. 167, 1939 California; *Nelson* v. *Sears Roebuck and Co.*, 312 U.S. 359, 1941, Iowa; *Henneford* v. *Silas Mason Co.*, 300 U.S. 577, 1937, Washington.) However none of the use tax acts of other states have the unique provision found in the Illinois act

for the retention of the use tax by a retailer. Hence none of the cases just cited involved the issue presented here.

The Illinois retailers' tax is not a sales tax upon purchasers, but an occupation tax upon retailers. (*Automatic Voting Machine Corp.* v. *Daley*, 409 Ill. 438-447, 1951.) Consequently retailers are not agents of the state to collect their own occupation tax from purchasers. (*People's Drug Shop* v. *Moysey*, 384 Ill. 283, 1943.) The sole duty of paying that tax rests upon retailers (*ibid.*). Nothing in either the retailers' act or the use tax act abates this primary obligation of a retailer to pay his own tax. *It is important to bear in mind that under Section 9 it is not the use tax which a retailer pays to the Department of Revenue with an abatement given of his own retailers' tax. He pays his own retailers' tax upon which there is no abatement and retains the use tax as his own.* As a consequence the use tax so far as Illinois purchases are concerned is levied for the sole benefit of Illinois retailers. They collect it and they retain it as of right. The tax becomes their property and does not enter into the state treasury.

So far as Illinois purcheses are concerned the act in question bears no pretense of a levy for governmental purposes. It is a direct levy for the sole benefit of a group composing the state's retailers. It is not paid into the public treasury where taxes customarily go. A tax in the general understanding of the term signifies an exaction for the support of government (*United States* v. *Butler*, 297 U.S. 1-61, 1935). A tax has never been thought to mean an appropriation from one group for the benefit of another (*ibid.*).

It has long been the interpretation of the Fourteenth Amendment that the appropriation by a state of taxes for a private purpose is a taking of property without due process of law. (*Citizens Savings and Loan Asso.* v. *Topeka*, 20 Wall. 655, 1875; *Green* v. *Frazier*, 253 U.S. 233, 1920;

City of Parkersburg v. *Brown*, 106 U.S. 487, 1883; *Thompson* v. *Consolidated Gas Co.*, 300 U.S. 55, 1939) and that a state may not impose taxes in aid of private enterprise (*Citizens Savings and Loan Asso.* v. *Topeka*, 20 Wall. 655, 1875; *City of Parkersburg* v. *Brown*, 106 U.S. 487, 1883; *Cole* v. *La Grange*, 113 U.S. 1, 1885; *Green* v. *Frazier*, 253 U.S. 233, 1920).

This is not a case where a tax upon one class may indirectly benefit another, as for example, a tax upon butter substitutes which burdened dealers in butter substitutes in their competition with dealers in butter (*A. Magnano Co.* v. *Hamilton*, 292 U.S. 40, 1934). The tax in that case was an ordinary excise which went into the state treasury. There the court said (p. 43), "*That the tax is for a public purpose is equally clear, since that requirement has regard to the use which is to be made of the revenue derived from the tax*, and not to any ulterior motive or purpose which may have influenced the legislature in passing the act." (Italics supplied.) In the instant case the tax is for the direct benefit of Illinois retailers who collect it. Not a penny of it is for the public benefit.

To be distinguished also is a payroll tax for unemployment compensation held to be for public purpose (*Carmichael* v. *Southern Coal and Coke Co.*, 301 U.S. 495, 1937). There the social and economic consequences of unemployment clearly established a tax for the purpose of alleviating such consequences as one for a public purpose.

In the instant case the appropriation of the tax to Illinois retailers does not bear the most remote appearance of a public purpose. If such an appropriation be for a public purpose then almost any conceivable appropriation of taxes from one class of taxpayers for the benefit of another class would be for a public purpose for no other reason than the class collecting the tax happened to be taxpayers in a particular occupation.

Upon that method of reasoning a tax might be levied upon tenants to be collected and retained by landlords for the reason that they are in the business of renting real estate and pay real estate taxes. So, too, a tax might be levied upon users of gas and electricity to be collected and retained by utility companies because they are in the business of selling gas and electricity and pay utility taxes.

C.

THE FEDERAL QUESTION RELATING TO THE VALIDITY OF SECTION 3 OF THE USE TAX ACT IS SUBSTANTIAL.

We have already shown that the retailers' tax is upon the occupation of selling tangible personal property at retail (Sec. 441, Ch. 120, p. 821, Vol. II, Illinois Revised Statutes, 1955). In construing the retailers' act the Illinois Supreme Court has held that where the principal occupation of a seller is the rendering of a service rather than the sale of personal property, the seller's occupation is not subject to the tax imposed by that act (*Mahon* v. *Nudelman*, 377 Ill. 331-335, 1941). That act does not impose a tax, even though a sale of tangible personal property is made, where the sale is an incident to the practice of a profession (*ibid.*) or the performance of skill or artistic ability (*ibid.*). The so-called "service occupation" rule has resulted in the exclusion of a wide variety of occupations from the tax imposed by the retailers' act.*

*To name a few of the classes excluded by the Illinois Supreme Court under the service occupation theory are sales of medicine and bandages by a hospital (*Mallen Co.* v. *Department of Finance*, 372 Ill. 598, 1940), sales of meals by a club to its members (*Swithiod Singing Club* v. *McKibbin*, 381 Ill. 194, 1942), the business of making blueprints (*Burgess Co.* v. *Ames*, 359 Ill. 427, 1935), and electrotypes (*A.B.C. Electrotype Co.* v. *Ames*, 364 Ill. 360, 1936), repairing shoes (*Revzan* v. *Nudelman*, 370 Ill. 180, 1938), remodeling fur coats (*Mahon* v. *Nudelman*, 377 Ill. 331, 1941), manufacturing machine tools made to order, (*Ingersoll* v. *Department of Revenue*, 405 Ill. 367, 1950) and the selling of eyeglasses by optometrists (*Babcock* v. *Nudelman*, 367 Ill. 626, 1937). There are many others in the class of service occupations.

Sec. 3 of the use tax act (Sec. 439.3 Ch. 120, p. 817 Vol. II Illinois Revised Statutes, 1955) provides that, "If the seller of tangible personal property for use would not be taxable under the Retailer's Occupation Tax Act despite all elements of a sale occurring in this state, then the tax imposed by this Act shall not apply to the use of such tangible personal property in this state."

Since the so-called service occupations are not subject to the retailers' tax, the result of the foregoing exemption given by Sec. 3 is that no purchaser of tangible personal property from a seller in a service occupation is subject to the use tax. As a consequence a member of a club pays no use tax for his lunch. His secretary who buys her lunch at a restaurant pays a use tax. One man buys a tailor made suit and pays no use tax. Another buys a ready made suit and pays a use tax. Both classes of users enjoy the identical privilege. These discriminations may be carried out to each of the many service occupations.

There is no reasonable basis for any of the foregoing classifications. The Illinois Supreme Court opinion justified the exemption given by Sec. 3 solely upon the basis that the use tax act is complementary to the retailers' act. (R. 40.)*

---

*In its opinion the court said, "While the distinctions that have been drawn are admitted to be relevant to an occupation tax upon retailers, they are said to be irrelevant, and therefore arbitrary and discriminatory, when included in a tax that falls upon the privilege of using property purchased at retail.

The argument would, we think, be persuasive if the use tax stood alone, for so far as use by the purchaser is concerned there is no distinction between a tailormade suit of clothes, for example, and one purchased at retail. But the tax before us does not stand alone. It is designed to complement and to protect the tax imposed upon the occupation of selling at retail, and the validity of its exemptions is to be determined in the light of that purpose. . . . The purpose of the use tax is to protect the base of the retailers' tax and the classification adopted is reasonably directed to this end."

In holding that the two acts are complementary, the court reached a conclusion exactly the opposite of what it had reached in its first opinion in this case when it held that the act in question was unconstitutional. (R. 21-22.)*

We maintain that the Illinois use tax is not complementary to the retailers' act as use taxes are in other states. Hence there is no reasonable basis for Sec. 3 of the act in question to grant exemptions in all cases where the retailers' tax act does not apply.

We have already shown that in all other states having use taxes both (1) a sales or retailers' tax and (2) a use tax are not due upon domestic sales. Either an exemption from the use tax is given (as in most states) or, only one of the taxes is payable as in some (Appendix E). In no state other than Illinois are both taxes due upon domestic sales.

The word "complement" means that which completes (The American College Dictionary) or supplies a deficiency (Webster's Collegiate Dictionary). In discussing the general nature of sales taxes and use taxes in other states this court has said that they "are complementary but serve very different purposes." (*Miller Bros. v. Maryland*, 347 U.S. 340-343, 1954.) *The sales tax* has the effect of increasing the cost to the consumer in the taxing state. (*Ibid.*) The *use tax* usually appears as a support to the sales tax. This it does in two respects. (1) One is the protection of the State's revenues by taking away from inhabitants the

*In its first opinion the court said, "The defendants argue that the complementary character of the act justifies its classifications. We are not impressed with this argument and find that this tax is not in fact a complement to the retailers' tax. . . . Unlike use taxes enacted in other states, a user in Illinois is not exempt from taxation by the mere fact that a retailers' occupation tax is also paid on the same transaction. Under the Illinois act, the user must pay the tax, but this tax may be retained by the retailer who has paid a retailers' occupation tax."

advantages of resorting to untaxed out-of-state purchases. (2) The other is the protection of local merchants against out-of-state competition by those able by lower tax burdens to offer lower prices. (*Ibid.*)

No use tax act of any other state that had been sustained by this court imposes the tax upon domestic purchases as does the Illinois act. (*Henneford* v. *Silas Mason Co.*, 300 U.S. 577, Washington, 1937; *Southern Pacific Co.* v. *Gallagher*, 306 U.S. 167, California, 1939; *Nelson* v. *Sears Roebuck and Co.*, Iowa, 1941.) These cases stress that the effect of such a use tax is to help local retailers compete upon terms of equality with retailers outside the state (*Henneford* v. *Silas Mason Co.*, p. 581); that property sold or used is taxed but once (*Southern Pacific Co.* v. *Gallagher, supra*, p. 364) and that the amount exacted from the sales tax payer and the use tax payer is at the same rate (*Southern Pacific Co.* v. *Gallagher, supra*, p. 172; *Nelson* v. *Sears Roebuck and Co., supra*, p. 364, "As we have seen, the use tax and the sales tax are complementary. Sales made wholly within Iowa carry the same burden as these mail order sales. A tax or other burden obviously does not discriminate against interstate commerce where quality is its theme.")

Tested by the foregoing principles the Illinois use tax act is not complementary to the retailers' act as are use tax acts of other states to their sales or retailers' acts. It does not "complete" or "supply the deficiency" of the retailers' tax for any one of the three following reasons:

(1) It does not merely plug the gap by taxing only out of state purchases that have escaped the Illinois Retailers' Act. It introduces a new tax upon domestic transactions that exists side by side with the retailers' tax. Such a tax upon domestic transactions is not a deterrent to an Illinois resident making purchases outside the state. Neither does it protect local retailers from out of state competition. A

use tax only upon out of state purchases would have accomplished both of those objects.

(2) We have previously shown that the use tax upon domestic transactions is collected and kept by Illinois retailers. It is imposed primarily for their benefit and not for the benefit of the state. It is inconceivable that a use tax levied for such a purpose "completes" or "makes perfect" the retailers' tax. We previously quoted in a footnote a portion of the first opinion of the Illinois Supreme Court (which held the act unconstitutional) that the retention of the use tax by retailers resulted in the two acts not being complementary. This was ignored by the court in its second opinion.

(3) In construing the use tax act and the retailers' act the Illinois Supreme Court in this case found that the rate of the use tax is not always the same as the retailers' tax. (R. 39.)* Despite the finding by the court shown in the footnote that the two acts are not complementary because the rate of tax is not the same, the court later in its opinion ignored

*"There is, however, one respect in which the use tax does not precisely complement the retailers' occupation tax. The former tax is based upon 'selling price,' the latter on 'gross receipts' from sales. 'Selling price' is defined in both statutes to mean the consideration for a sale valued in money whether received or paid in money or otherwise, 'including cash, credits, service and property of every kind or nature' . . . (Ill. Rev. Stat., 1955, chap. 120, pars. 439.2, 440.) By an amendment in 1955, however, the definition of 'gross receipts' in the Retailers' Occupation Tax Act was amended so that it 'means the total selling price, . . . excluding therefrom any amount allowed as credit for tangible personal property taken in trade.' (Ill. Rev. Stat., 1955, chap. 120, par. 440.) The result of this discrepancy in definitions is that in cases in which property is received in trade as a part of the purchase price, the tax due may not be the same under the two statutes. For example, if a new car is purchased for $3000 and the buyer's old one is received in trade at $1000, the use tax will be $75. Under the Retailers' Occupation Tax Act, however, the value of the old car would not be included in the 'gross receipts' on which the tax is computed, so that the tax would be $50."

that finding and inconsistently concluded that the two acts are complementary without referring to its previous finding. We submit that two such taxes as these cannot be complementary when both are not at the same rate.

An exemption in the revenue act of a state making a classification with no apparent, substantial, or fair relation to the object of the act or public interest, violates the equal protection clause of the Fourteenth Amendment. (*Colgate* v. *Harvey*, 296 U.S. 404, 1935.)

We submit that, for the reasons we have given, Sec. 3 of the act in question falls within the condemnation of this court in the case just cited. The use tax act not being complementary to the retailers' act, there is no reasonable basis to provide for the same exemptions in the former as in the latter. It is reasonable for a state to impose a tax upon the occupation of selling tangible personal property at retail and exclude service occupations from the tax. It is altogether unreasonable and arbitrary to impose a tax *upon the use* of tangible personal property purchased at retail and exempt purchasers who buy from sellers for no other reason than they happen to buy from sellers who are not subject to the retailers' tax. There is no apparent, substantial or fair relation of such classifications to the object of the act or the public interest.

D.

IF EITHER SECTION 9 OR SECTION 3 BE HELD UNCONSTITUTIONAL, THEN THE ENTIRE ACT MUST FALL.

Where the sections of an act are so mutually connected and dependent on each other as conditions or considerations for each other as to warrant the belief that the legislature intended them as a whole and that if all could not be carried into effect the legislature would not pass the residue independently, and some parts are unconstitutional, all of the provisions of the act thus dependent must fall. (*Berea College* v. *Kentucky*, 211 U.S. 45-55, 1908.)

Tested by the foregoing rule, the entire Illinois use tax act must fall if either Sec. 9 or Sec. 3 be unconstitutional. Sec. 9 is one of the basic features of the act. The Illinois legislature definitely intended that the use tax collected by Illinois retailers should not enter the state treasury. If Sec. 9 alone should be held invalid, with the balance of the act standing, then all collections of use taxes upon Illinois purchasers would be paid into the state treasury, a result the Illinois legislature never intended. Likewise, Sec. 3 is one of the basic features of the act in question. The elimination of the invalid provisions of that section without invalidating the entire act would mean that the tax would be imposed upon persons whom the legislature intended should not pay it.

It is therefore respectfully submitted that this court has jurisdiction of this appeal.

Respectfully submitted,

AMOS M. MATHEWS,
280 Union Station Building,
Chicago, Illinois.

JEROME F. DIXON,
231 S. La Salle St.,
Chicago, Illinois.

MICHAEL M. PHILLIPS,
105 W. Adams St.,
Chicago, Illinois.
Attorneys for John W. Turner Jr., Appellant.

APPENDIX A

COPY OF JUDGMENT APPEALED FROM

The following is a copy of the judgment of the Illinois Supreme Court appealed from. (R. 48):

UNITED STATES OF AMERICA

STATE OF ILLINOIS } ss.
SUPREME COURT }

AT A TERM OF THE SUPREME COURT, begun and held in Springfield, on Monday, the eleventh day of March in the year of our Lord, one thousand nine hundred and fifty-seven, within and for the State of Illinois.

Present: RAY I. KLINGBIEL, CHIEF JUSTICE

JUSTICE JOSEPH E. DAILY — JUSTICE WALTER V. SCHAEFER

JUSTICE GEORGE W. BRISTOW — JUSTICE HARRY B. HERSHEY

JUSTICE CHARLES H. DAVIS — JUSTICE BYRON O. HOUSE

LATHAM CASTLE, *Attorney General*

ROBERT G. MILEY, *Marshal*

Attest: MRS. EARLE BENJAMIN SEARCY, *Clerk*

BE IT REMEMBERED, that, to-wit: on the 20th day of March 1957, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

No. 34044

JOHN W. TURNER, JR.,

Appellant,

vs.

WARREN E. WRIGHT,
Treasurer of the State of Illinois

and

RICHARD J. LYONS,
Director of the Department of Revenue
of the State of Illinois,

Appellees,

Appeal from Circuit Court, Cook County 55 C 12059
Error to

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the decree aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

THEREFORE, it is considered by the Court that the decree of the Circuit Court of Cook County aforesaid, BE AFFIRMED IN ALL THINGS AND STAND IN FULL FORCE AND EFFECT, notwithstanding the said matter and things therein assigned for error.

I, MRS. EARLE BENJAMIN SEARCY, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing

is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said court this 24th day of May, 1957.

(SEAL)

/s/ MRS. EARLE BENJAMIN SEARCY, *Clerk*
Supreme Court of the State of Illinois.

APPENDIX B

FIRST OPINION OF ILLINOIS SUPREME COURT

Docket No. 34044—Agenda 42—May, 1956.

John W. Turner, Jr., Appellant, vs. Warren E. Wright, State Treasurer, *et al.*, Appellees.

Mr. Justice Davis delivered the opinion of the court:

This case comes to us on direct appeal from the order of the circuit court of Cook County dismissing plaintiff's complaint for a declaratory judgment and injunction against the enforcement of the Illinois Use Tax Act, (Ill. Rev. Stat. 1955, chap. 120, pars. 439.1-439.18,) and the 1955 amendment to section 4 of the Uniform Motor Vehicle Anti-Theft Act (Ill. Rev. Stat. 1955, chap. 95½, par. 77,) which made certain incidental but necessary changes as an enforcement aid to the Use Tax Act, on the ground that such enactments are unconstitutional.

The plaintiff, a citizen and taxpayer of Illinois, purchased a motor vehicle in Indiana on August 1, 1955, from a retail automobile dealer, and thereafter took possession of, and brought said vehicle into Illinois, where he used and operated it. By the terms of the Use Tax Act, he was required to pay a use tax to the Department of Revenue, which he did under protest. The case squarely questions whether the Illinois Use Tax Act contravenes the revenue provisions of the constitution of the State of Illinois, as well as other constitutional guarantees.

It is the contention of the plaintiff that the Use Tax Act violates the Illinois constitution and the fourteenth amendment to the United States constitution. *Amici curiae* urge that the use tax is not in fact a privilege tax, but rather that it is a property tax without uniformity and that the act unreasonably classifies persons, all in violation of section 1 of article IX and the fourteenth amendment.

The defendants, by the Attorney General, argue that the Illinois use tax is a nondiscriminatory tax, and that the act is not vague but is justified as being complementary to and a corollary of the Retailers' Occupation Tax Act (Ill. Rev. Stat. 1955, chap. 120, pars. 440-453.) Defendants further contend that any discriminatory provision contained in the act is severable.

Before analyzing the specific constitutional objections raised, we believe it proper to examine generally the provisions of the Illinois Use Tax Act. The act imposes a tax upon the purchasers of all tangible personal property purchased at retail and not for the purpose of resale. The tax is at the rate of 2½ per cent of the selling price, and is imposed upon all purchasers whether they buy within or outside the State. If the taxpayer buys from a retailer licensed under the Retailers' Occupation Tax Act, the retailer is required to collect the tax and give the buyer a receipt. A nonresident retailer is entitled to obtain a permit from the Department of Revenue and collect and remit the tax. If a taxpayer purchases property from a retailer who is not required to file returns with the Department and does not pay the tax to the retailer, the taxpayer shall file a return and pay the tax directly to the Department of Revenue. However, if a particular seller, such as one engaged in a service occupation, would not be taxable under the Retailers' Occupation Tax Act if the sale had occurred in Illinois, then the tax imposed by the Use Tax Act does not apply. This is true except in the case of any person who is engaged in a business which is not subject to the tax imposed by the Retailers' Occupation Tax Act because of involving the sale of, or a contract to sell real estate, or a construction contract to improve real estate, but who, in the course of conducting such business, transfers tangible personal property to users or consumers in the finished form in which it was purchased, and which does not become

real estate. In such a transaction, if a separate charge is made for tangible personal property so transferred, the value of such property shall be the amount separately charged, or if no separate charge is made, the value of such property shall be its cost to the transferor, and such use of tangible personal property is subject to the use tax although it would not be subject to the retailers' occupation tax.

While under the act, if a single sale of tangible personal property takes place in Illinois, the use tax and retailers' Occupational tax are both due, the Use Tax Act provides that a retailer need not remit that part of any tax collected by him to the extent that he remits the tax imposed by the Retailers' Occupation Tax Act. The act further provides that when the taxpayer pays the tax directly to a retailer, the latter may refund the money if the property is later returned to the retailer; however, no such refund provision is given a taxpayer who, by the act, is required to pay the tax directly to the Department of Revenue.

We think it helpful to a decision of the question before us to consider the history and development of the revenue article of our constitution, as well as the Use Tax Act, which was enacted in an effort to obtain revenue within the proscriptions of State and Federal constitutions. Originally, general property taxes were the principal source of revenue in Illinois, and our first constitution provided "that the mode of levying a tax shall be by valuation, so that every person shall pay a tax in proportion to the value of the property he or she has in his or her possession." (Const. of 1818, art. VIII, sec. 20.) With the adoption of the constitutions of 1848 and 1870, the property taxes were continued as the principal source of revenue and provided most of the revenue for State and local purposes. However, in the constitution of 1848, specific authority was granted to the General Assembly to impose taxes upon

occupations, franchises and privileges. This provision was carried over into section 1 of article IX of our present constitution, adopted in 1870, but was made subject to the limitation that such a tax could only be imposed "by general law, uniform as to the class upon which it operates." While franchise and privilege taxes have been used from time to time, the specific constitutional limitations upon the taxing power of the State were not considered by this court until 1932, following the enactment of a graduated income tax law. This court then stated that section 1 of article IX limited the taxing power of the General Assembly to "(1) property taxes on a valuation basis; (2) occupation taxes; and (3) franchise and privilege taxes." (*Bachrach* v. *Nelson*, 349 Ill. 579, at page 589.) Thereafter, the legislature enacted the present Retailers' Occupation Tax Act (Ill. Rev. Stat. 1955, chap. 120, pars. 440-453,) which imposed a tax upon the occupation of "selling tangible personal property to purchasers for use and consumption." The validity of this act was upheld in *Reif* v. *Barrett*, 355 Ill. 104, and thereafter the legislature no longer relied upon a property tax to provide funds for the various activities of the State. Since then tax revenues have been derived from the retailers' occupation tax and other occupational, franchise and privilege taxes imposed by the legislature. Winning, The Revenue System of Illinois, S.H.A. chap. 120, p. 1.

At the time of the enactment of the Retailers' Occupation Tax Act, the legislature had already levied an inheritance tax which was sustained as a privilege tax (*Magoun* v. *Illinois Trust & Savings Bank*, 170 U.S. 283; *Kochersperger* v. *Drake*, 167 Ill. 122,) and a motor vehicle tax which was sustained as a tax upon the privilege of operating a motor vehicle upon public highways. (*People* v. *Deep Rock Oil Corp.* 343 Ill. 388.) In 1941 the legislature also enacted the Cigarette Tax Act (Ill. Rev. Stat. 1955, chap.

120, pars. 453.1-453.30,) which imposed an occupation tax upon persons engaged in business as distributors of cigarettes. While these sources of revenue were not objectionable as being violative of the constitution of Illinois (cf. *Winter* v. *Barrett*, 352 Ill. 441; *Bachrach* v. *Nelson*, 349 Ill. 579,) the Illinois legislature was still limited by the commerce clause of the constitution of the United States, which prohibited a sales tax or retailers' occupation tax which, when imposed on a transaction, burdened interstate commerce. (*Norton Co.* v. *Department of Revenue*, 340 U.S. 534.) The Illinois retailers' occupation tax could be avoided by the purchase of tangible personal property outside the State for use within the State.

This problem was common throughout the States of the nation, and in order to encompass this source of revenue, legislative draftsmen formulated a so-called "use tax" to obviate the proscription of the commerce clause of the United States constitution, and such tax has been repeatedly upheld as a tax "not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end." (*Henneford* v. *Silas Mason Co.* 300 U.S. 577.) A logical result of this distinction was the enactment of use taxes in 28 States for the purpose of gathering in revenue from transactions beyond the constitutional scope of their particular sales or retailers' occupation tax acts. (CCH State Tax Guides.) We think it clear, as all parties seem to concede, that the dominant purpose of the act before us was to complement the valid Retailers' Occupation Tax Act and remove the buyer's temptation to order merchandise in other States in an effort to escape payment of the tax on local sales. (*Johnson* v. *Halpin*, 413 Ill. 257.) The Illinois Use Tax Act therefore appears to have its genesis in the same considerations that gave rise to other so-called "use tax" statutes. (*Miller Bros.* v. *State of Maryland*, 347 U.S. 340.) It now seems certain

that the tax before us is inoffensive to the commerce clause of the Federal constitution. *Nelson* v. *Sears, Roebuck & Co.* 312 U. S. 359.

No effort was made in Illinois to reach out-of-State purchases until the enactment of the Cigarette Use Tax Act in 1951. (Ill. Rev. Stat. 1955, chap. 120, pars. 453.31-453.67.) The constitutionality of this act was upheld in *Johnson* v. *Halpin,* 413 Ill. 257, and this decision led to the enactment of the present use-tax legislation. However, we made it clear when we struck down the motor vehicle use tax in *People ex rel. Schoon* v. *Carpentier,* 2 Ill.2d 468, that a tax may not comply with the constitution merely because the legislature designates it a use tax.

We think it clear that the tax before us is not a property tax, nor is it a franchise or occupation tax. It must be sustained, if at all, as a tax upon a privilege. As such it must be "uniform as to the class upon which it operates."

With this historical background in mind, we turn to the attacks upon this particular act. We are not concerned with its wisdom, purpose, or benefits; the question before us is whether it complies with the Illinois and Federal constitutions.

The plaintiff urges that the tax does not meet the uniformity requirement of the constitution and that it is discriminatory in that it is imposed on users of tangible personal property purchased from retailers, as defined in the act, but not on users of property purchased from others; that the act imposes a tax upon purchasers from those engaged in the building trades, but not upon purchasers from other service occupations; and that the act provides for refunds to certain taxpayers returning property to retailers licensed under the act, but not to taxpayers who buy from others. Defendants answer that these discriminations are justified because the act is complementary to the retailers' occupation tax.

We think there is merit in plaintiff's contentions. The present retailers' occupation tax is levied upon the "occupation" of selling tangible personal property at retail for use and consumption. Since it embraces all persons engaged in such "occupation," it is clearly uniform upon the class on which it operates. (*Reif* v. *Barrett,* 355 Ill. 104.) This court invalidated a prior Retailers' Occupation Tax Act, as discriminatory and lacking in uniformity, which for the purposes of that act, declared that " 'tangible personal property' does not mean or include farm products or farm produce sold by the producer thereof * * *." (*Winter* v. *Barrett,* 352 Ill. 441, 459.) This court, in construing the Retailers' Occupation Tax Act, has held that the tax is only upon the occupation of selling tangible personal property at retail for use and consumption, and therefore has held it inapplicable to persons engaged in service occupations. (*Burroughs Co.* v. *Hollingsworth,* 415 Ill. 202; *Material Service Corp.* v. *Hollingsworth,* 415 Ill. 284; *Ingersoll Milling Machine Co.* v. *Department of Revenue,* 405 Ill. 367; *Svithiod Singing Club.* v. *McKibbin,* 381 Ill. 194; *Mahon* v. *Nudelman,* 377 Ill. 331; *Babcock* v. *Nudelman,* 367 Ill. 626.) The fact that these sales and transactions are without the scope of the act does not render the Retailers' Occupation Tax Act discriminatory and nonuniform since it levies a tax upon the occupation of selling tangible personal property at retail for use and consumption, and the service occupations that are not taxed are not within that occupational classification.

In the Use Tax Act now before us, however, the incident of taxation is not the occupation but "the privilege of using tangible personal property in this State." Section 2 of the Use Tax Act defines "use" as the "exercise by any person of any right or power over tangible personal property incident to the ownership of that property." Section 3 of the act provides: "If the seller of tangible personal

property for use would not be taxable under the Retailers' Occupation Tax Act despite all elements of the sale occurring in Illinois, then the tax imposed by this Act shall not apply to the use of such tangible personal property in this State." This provision creates a class of tangible personal property users who are exempt from tax by virtue of the fact that they purchased such property from a seller who is not liable for a retailers' occupation tax on the sale in question. Section 2 of the act, however, removes users of personal property purchased from building contractors from such classification and declares that users of such property are not within such exempt class and are subject to the tax. While the uniformity clause of the Illinois constitution does not prohibit a use tax having exemptions and classifications, it does proscribe exemptions and classifications which are discriminatory or without a reasonable basis. Since the incident of use taxation is the use of tangible personal property, we can see no justification for a classification which exempts from such tax all persons who use such property merely because their seller is not taxable under the Retailers' Occupation Tax Act. If the tax is upon the use, why should a person using a suit purchased at a retail store bear the burden of the tax, while his neighbor who wears a tailor-made suit be exempt therefrom? Similar questions could be posed in connection with the other occupations classed as service occupations under the Retailers' Occupation Tax Act. In all of these cases the incident of taxation, the "use," is identical. The exempt classification created has no relation to the use of the property, but rather is bottomed on whether the person selling to the exempt taxpayer would have been obligated to pay a tax under the Retailers' Occupation Tax Act, and even this classification does not apply uniformly since the building contractor is removed therefrom.

We have held that a statutory classification resting upon

substantial differences in kind, situation, or circumstance which is reasonably related to the legislative purpose does not offend the constitutional prohibition. (*Illinois Bell Telephone Co.* v. *Board of Review of Dept. of Labor*, 413 Ill. 37.) The uniformity required by section 1 of article IX of the Illinois constitution is that the classification must rest upon a reasonable basis and the legislation must apply uniformly to all members of the class. (*City of Chicago* v. *Willett Co.*, 1 Ill.2d 311.) The Use Tax Act fails to meet these requirements. However, the defendants argue that it is constitutional for the sole reason that it is designed to complement the valid Retailers' Occupation Tax Act and prevent the avoidance of the payment of that tax. In so arguing, they place great emphasis on our recent decision in *Johnson* v. *Halpin*, 413 Ill. 257, where we sustained the Cigarette Use Tax Act on that basis. We do not consider the *Johnson case* applicable. In that case, the tax was laid uniformly upon the entire class of cigarette users under the provisions of the act; no user was exempt; and the ultimate result was that the economic burden was laid upon all Illinois users in the same amount.

The classification which the defendants here attempt to justify is not dependent upon a difference or distinction inherent in the use of property which is the incident of taxation. The difference is one that was created by the legislature in the Retailers' Occupation Tax Act. However, what is a legitimate classification when the incident of taxation is the occupation, is not necessarily a reasonable classification when the incident of taxation is the use of property. In resolving a similar issue in *Giebelhausen* v. *Daley*, 407 Ill. 25, at page 37, this court stated: "The principle applicable to a proper classification of persons subject to a law must rest on some difference which has a reasonable and just relation to the act in respect to which the classification is proposed."

The defendants argue that the complementary character of the act justifies its classifications. We are not impressed with this argument, and find that this tax is not in fact a complement to the retailers' tax. The Use Tax Act does not complete or make perfect the Retailers' Occupation Tax Act, instead it exempts a substantial class of users from the tax if their purchase is from a seller who is not liable for a retailers' occupation tax. A purchaser of personal property from a building contractor may be subject to a use tax while the building contractor would not be subject to a retailers' occupation tax. On the other hand, purchasers from vendors engaged in other service occupations, indistinguishable in their nature from that of a building contractor, would be exempt from the use tax as well as the retailers' occupation tax. Unlike use taxes enacted in other States, a user in Illinois is not exempt from taxation by the mere fact that a retailers' occupation tax is also paid on the same transaction. Under the Illinois act, the user must pay the tax, but this tax may be retained by the retailer who has paid a retailers' occupation tax. Clearly, this lack of uniformity as to the class on which it operates prevents this tax from equalizing the tax burden of the local retailers. (Cf. *Henneford v. Silas Mason Co.* 300 U.S. 577, 81 L. ed. 814; *Nelson* v. *Sears, Roebuck & Co.* 312 U.S. 359, 85 L. ed. 888.) Accordingly, we hold that the Use Tax Act violates the uniformity provision of section 1 of article IX of the constitution of Illinois.

Defendants further argue that if the classifications contained in the act are unreasonable, the exemptions granted are severable, and the entire act need not fall. Regardless of the severability provision of the act, if we cannot say that the legislative body would have passed the enactment with the invalid portions eliminated, the entire statute must be held invalid. (*City of Chicago Heights* v. *Public Ser-*

vice Co. 408 Ill. 604.) In the case at bar, the attempt to complement the retailers' occupation tax is evident. To strike out the exemptions carved by the legislature would be to impose a tax upon users not intended to be included by the legislature, and would be, in effect, the imposition of a tax by this court. We consider the provisions of this act so mutually connected and dependent, as conditions, considerations, and compensations for each other, that the legislature intended them as a whole, and the entire act must fall. *Winter* v. *Barrett*, 352 Ill. 441.

The 1955 amendment to section IV of the Uniform Motor Vehicle Anti-Theft Act (Ill. Rev. Stat. 1955, chap. 95½, par. 77,) was enacted as a companion provision of the Use Tax Act. It provides that where an applicant seeks a certificate of title for a motor vehicle, he must exhibit a receipt to the Secretary of State evidencing the payment of the use tax due on account of the purchase. In view of our decision concerning the validity of the Use Tax Act, we likewise declare this amendment to be unconstitutional.

The brief of *amici curiae* earnestly urges that the use of personal property is not a "privilege" within the meaning of the Illinois constitution. This argument goes to the broad power of the legislature to enact use-tax legislation. Sections 1 and 2 of article IX of the Illinois constitution provide:

"§ 1. The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property—such value to be ascertained by some person or persons, to be elected or appointed in such manner as the general assembly shall direct, and not otherwise; but the general assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, inn-

keepers, grocery keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, vendors of patents, and persons or corporations owning or using franchises and privileges, in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates.

"§ 2. The specification of the objects and subjects of taxation shall not deprive the general assembly of the power to require other subjects or objects to be taxed in such manner as may be consistent with the principles of taxation fixed in this constitution."

While we do not determine whether the use of personal property is such privilege, yet, subject to constitutional limitations, we find no prohibition in the foregoing sections of the revenue article against the enactment of such legislation. *Johnson* v. *Halpin*, 413 Ill. 257.

Other constitutional violations are urged, but need not be considered in view of our conclusion that the act lacks uniformity as to the class on which it operates. The decree of the circuit court dismissing the complaint must be reversed and the cause remanded with directions to grant the relief prayed.

Reversed and remanded, with directions.

APPENDIX C

MAJORITY OPINION OF ILLINOIS SUPREME COURT FOLLOWED BY DISSENTING OPINION

Docket No. 34044—Agenda 36—January, 1957.

John W. Turner, Jr., Appellant, v. Warren T. Wright, State Treasurer, *et al.*, Appellees.

Mr. JUSTICE SCHAEFER delivered the opinion of the court:

The plaintiff, a resident of Illinois, bought an automobile in Indiana, brought it into Illinois and used it here. Under the terms of the Use Tax Act, (Ill. Rev. Stat. 1955, chap. 120, pars. 439.1-439.18,) a tax thereupon became due. He paid it under protest, and brought this action to secure a refund. The circuit court dismissed his complaint and he appeals.

The Use Tax Act was enacted in 1955. It imposes a tax "upon the privilege of using in this State tangible personal property purchased at retail . . . from a retailer." (Section 3.) It applies whether the property is purchased in Illinois or elsewhere. The term "use" is defined basically to mean the exercise "of any right or power over tangible personal property incident to the ownership of that property." (Section 2.) The use tax is imposed at the same rate as the tax under the Retailers' Occupation Tax Act, (Section 3; cf. Ill. Rev. Stat. 1955, chap. 120, par. 441.) It does not apply to out-of-State transactions that would not measure a tax under the Retailers' Occupation Tax Act if they occurred in Illinois, nor is it applicable to the use of property purchased outside of Illinois on which a sale or use tax has been paid to another State, to the extent of the tax so paid. (Section 3.) The tax is to be collected by the retailer, but to the extent that a retailer remits the tax imposed by the Retailers' Occupation Tax Act, he is not required to remit the tax imposed by the Use Tax Act. (Section 9.) An out-of-State retailer

may be licensed by the Department of Revenue to collect and remit the tax. (Section 6.) One who purchases from an out-of-State retailer who is not so licensed is required to pay the tax directly to the Department. (Section 10.) The act incorporates by reference many of the administrative provisions of the Retailers' Occupation Tax Act. (Section 12.)

The validity of the statute under the commerce clause of the Federal constitution is not challenged, but numerous other constitutional objections are advanced by the plaintiff and by *amici curiae* who were given permission to file a brief. The plaintiff concedes that the General Assembly has the power to pass a use tax, and directs his attack at specific provisions of the present act. *Amici curiae*, however, contend that the constitution of Illinois prohibits the passage of any general use tax. This is the most fundamental objection raised, and we consider it first.

The argument starts with the broad dictum of *Bachrach* v. *Nelson*, 349 Ill. 579, that the constitution restricts the taxing power of the General Assembly to (1) property taxes on an *ad valorem* basis, (2) occupation taxes and (3) franchise or privilege taxes. It is then pointed out that the present tax is obviously not a franchise or occupational tax, and that it cannot be sustained as a property tax because it is not levied on an *ad valorem* basis, or as a privilege tax because it does not involve conduct over which the General Assembly has "a special power of control."

The present tax purports to be a privilege tax, like the use taxes in effect in many other States. (129 A.L.R. 223; 153 A.L.R. 609.) Substantially the same argument that is made here was advanced against the Cigarette Use Tax Act in *Johnson* v. *Halpin*, 413 Ill. 257. The court there analyzed the pertinent decisions and rejected the argument, saying: "On the basis of the foregoing analysis, it is apparent that the concept of 'privilege' with reference to

the taxing power has not been limited in Illinois, or in other States, to conduct previously authorized by the legislature, or which the legislature could entirely abolish, or to benefits conferred by the State. For the right to use the streets and the highways, and the right to make *inter vivos* gifts which are effective at death, all of which have been sustained as taxable privileges in Illinois, were regarded as common rights open to all persons prior to legislative action thereon. Therefore, a taxable privilege may involve lawful rights and conduct enjoyed without previous legal authority, but over which the legislature has some power of control or classification. A tax upon such rights would be valid provided the classification were reasonable, and the statute provided for uniformity among the constituents of the class. *Harder's Storage Co.* v. *City of Chicago*, 235 Ill. 58." 413 Ill. at 270.

In the *Johnson case* the court pointed to an additional ground upon which the Cigarette Use Tax could be sustained, saying: "Moreover, the selection of this particular privilege upon which to levy a tax is both reasonable and proper, since it is designed to complement the valid Cigarette Tax Act, and prevent the avoidance of the payment of that tax." (413 Ill. at 271.) The same considerations support the present tax.

It has been authoritatively said that "[m]any years of litigation have not resolved the uncertainties and ambiguities in the nonproperty provisions of Sections 1 and 2" of article IX of the constitution. (Cushman, Proposed Revision of Article IX, 1952 Ill. Law Forum, 226, 237.) Section 2 provides: "The specification of the objects and subjects of taxation shall not deprive the general assembly of the power to require other subjects or objects to be taxed in such manner as may be consistent with the principles of taxation fixed in this constitution." This provision of the revenue article of the constitution has received

varying interpretations. See, *e.g.*, *Illinois Central Railroad Co.* v. *County of McLean*, 17 Ill. 291; *People* v. *Worthington*, 21 Ill. 170; *Raymond* v. *Hartford Fire Insurance Co.* 196 Ill. 329; *Harder's Fire Proof Storage and Van Co.* v. *City of Chicago*, 235 Ill. 58; *Bachrach* v. *Nelson*, 349 Ill. 579; *Reif* v. *Barrett*, 355 Ill. 104; *Johnson* v. *Halpin*, 413 Ill. 257.

But the uncertainty that has persisted as to the precise scope of section 2 of article IX need not trouble us in this case. Use taxes were developed, as the plaintiff points out, to prevent evasion of the tax that applies when retail purchases are made within the State, and to protect the retail local merchant against diversion of his business to out-of-State sellers. Those are the purposes of the present tax. Such a protective tax can depend for its justification upon the tax that it supports. The principle is not new in our law. Upon this basis completed gifts *inter vivos* that are not subject to revocation have been included in the estate of the donor for inheritance tax purposes if they were made in contemplation of death. And the statute fixes a presumption that gifts made within two years of the donor's death were made in contemplation of it. (Ill. Rev. Stat. 1955, chap. 120, par. 375.) Such a provision has been regarded as necessary to protect the base of the inheritance tax. (See *Rosenthal* v. *People*, 211 Ill. 306; *In re Estate of Benton*, 234 Ill. 366; *People* v. *Danks*, 289 Ill. 542.) A supplemental tax so levied to protect an admittedly valid tax from evasion or avoidance is clearly, in our opinion, a tax that is "consistent with the principles of taxation fixed in this constitution." We hold, therefore, that the General Assembly is not without power to enact a use tax.

While the plaintiff concedes that the constitution does not prohibit the imposition of a complementary use tax, he argues that the present statute is invalid. He points to the fact that other States that have use taxes impose them

only upon the purchase of property outside the State for use within it, and he argues that the Illinois tax is not complementary because it falls upon purchases made within the State as well as upon those made outside, and thus introduces a new tax upon domestic transactions. The act requires the Illinois retailer to collect the use tax upon the sales he makes. It does not require him to remit that tax to the State, however, to the extent that he remits the retailers' occupation tax with respect to the sale of the same property. (Section 9.) Plaintiff also contends that this setoff provision provides for a gift of public funds to private individuals, permits the commutation of taxes and provides for the cancellation of a debt due to the State, all in violation of the constitution. Const., art. IX, secs. 6 and 7; art. IV, sec. 23.

The statute provides for a use tax that falls alike on those who purchase at retail within the State and those who purchase outside of it. That tax is to be collected by the Illinois retailer, but to the extent that he remits the tax due under the Retailers' Occupation Tax Act he is not required to remit the tax due under the Use Tax Act. The tacit assumption of the statute is that by this mechanism the tax advantage that was enjoyed by the buyer who purchased outside the State will be eliminated, without increasing the burden upon the buyer who purchases within the State. The accuracy of that assumption is not challenged. The Illinois retailer is required to remit one tax of 2½ per cent with respect to each sale within the State. That is the same tax that is levied with respect to each out-of-State purchase for use within the State. It is true that the scheme of this tax is more complex than that of a use tax that falls only on out-of-State purchases. But its purpose and its results are those of the typical use tax, and the formal differences in the method by which those purposes are accomplished do not affect the validity of the statute.

It is not intended that both taxes shall reach the treasury with respect to a single transaction. It is intended and provided that one tax, and only one, shall reach the State treasury with respect to each purchase of property for use within the State, whether or not the purchase is made within Illinois. To that end the statute provides that the use tax collected by the retailer does not constitute a debt owed by him to the State when he "is relieved of the duty of remitting such tax to the Department by virtue of his being required to pay the tax imposed by the Retailers' Occupation Tax Act upon his gross receipts from the same transaction." (Section 8.) Only if the way in which the two taxes are interrelated is ignored is it possible to say that there is here a gift of public funds, commutation of taxes, or the cancellation of a debt owing to the State. The method by which the two taxes are integrated may be cumbersome, but it is not unconstitutional.

There is, however, one respect in which the use tax does not precisely complement the retailers' occupation tax. The former tax is based upon "selling price," the latter on "gross receipts" from sales. "Selling price" is defined in both statutes to mean the consideration for a sale valued in money whether received or paid in money or otherwise, "including cash, credits, service and property of every kind or nature * * *." (Ill. Rev. Stat. 1955, chap. 120, pars. 439.2, 440.) By an amendment in 1955, however, the definition of "gross receipts" in the Retailers' Occupation Tax Act was amended so that it "means the total selling price * * *, excluding therefrom any amount allowed as credit for tangible personal property taken in trade." (Ill. Rev. Stat. 1955, chap. 120, par. 440.) The result of this discrepancy in definitions is that in cases in which property is received in trade as a part of the purchase price, the tax due may not be the same under the two statutes. For example, if a new car is purchased for $3000 and the buyer's old one is received in trade at $1000, the use tax

will be $75. Under the Retailers' Occupation Tax Act, however, the value of the old car would not be included in the "gross receipts" on which the tax is computed, so that the tax would be $50. "The retailer, however, is required to remit to the Department the full $75, because he is excused from remitting the use tax that he collects only to the extent that he remits the retailer's tax with respect to the same transaction." No discrimination between purchasers is involved in this situation, because each purchaser is required to pay the same amount as every other purchaser. And there is no unjust enrichment of the retailer, for he is required to remit to the Department the full amount that he has collected. That the two taxes are not precisely identical therefore deprives no one of any constitutional rights.

The exemption provisions of the act are also attacked. The use tax falls on "the privilege of using in this State tangible personal property purchased at retail . . . from a retailer." The basic terms employed in the Use Tax Act are those used in the Retailers' Occupation Tax Act and, except in the instance just discussed, they are so defined as to make the scope of the two acts the same. In addition, section 3 of the Use Tax Act contains the following provision designed to limit the impact of the tax to those transactions that would measure a tax under the Retailers' Occupation Tax Act: "If the seller of tangible personal property for use would not be taxable under the Retailers' Occupation Tax Act despite all elements of the sale occurring in Illinois, then the tax imposed by this Act shall not apply to the use of such tangible personal property in this State."

There are actions that the retailers' tax does not reach, because although they involve the physical transfer of personal property at retail, the element of service is so pronounced that it has been thought to dominate the element

of sale. (See, *e.g.*, *Mahon* v. *Nudelman*, 377 Ill. 331; *Huston Brothers Co.* v. *McKibbin*, 386 Ill. 479.) The use tax also exempts these transactions, and plaintiff argues that because it does so it is unconstitutional. While the distinctions that have been drawn are admitted to be relevant to an occupation tax upon retailers, they are said to be irrelevant, and therefore arbitrary and discriminatory, when included in a tax that falls upon the privilege of using property purchased at retail.

The argument would, we think, be persuasive *if the use tax stood alone*, for so far as use by the purchaser is concerned there is no distinction between a tailormade suit of clothes, for example, and one purchased at retail. But the tax before us does not stand alone. *It is designed to complement and to protect the tax imposed upon the occupation of selling at retail, and the validity of its exemptions is to be determined in the light of that purpose.* The question here is not whether the legislature *is required* to shape the use tax that it imposes to conform to the tax upon retailers, but whether it *may constitutionally do so.* We think that it may. The purpose of the use tax is to protect the base of the retailers' tax and the classification adopted is reasonably directed to this end. Whether the General Assembly could go further and broaden the base of the use tax beyond the limits of the occupation tax upon retailers is not before us.

In addition to his general attack upon the exemption scheme of the use tax, the plaintiff also challenges one particular exemption. In 1955 the General Assembly amended the Retailers' Occupation Tax Act so that the tax would reach tangible personal property in a finished form that was transferred in connection with a sale of real estate or a building construction contract, but did not become a part of the real estate, such a bathtubs, stoves, refrigerators and the like. (Ill. Rev. Stat. 1955, chap. 120, par. 440.)

To correlate the two taxes, the Use Tax Act includes a provision, in substantially the same language, bringing these same transactions within the scope of the use tax. (Section 1.) It is argued that the inclusion of this provision makes an invalid subclassification among those engaged in service enterprises, and that this subclassification makes the statute invalid. The distinction that the provision draws appears to be, as the plaintiff says, between the sale of personal property in a finished form, as in the instances enumerated, and its sale in an unfinished form. We are unable to see wherein such a distinction is improper. In any case, so far as the use tax is concerned, this particular provision stands upon no different footing than the others that are designed to correlate the two statutes. If there is vice in the provision as it appears in the Retailers' Occupation Tax Act, the attack should be directed at that act, and not at the statute designed to complement it.

The title of the Use Tax Act is: "An Act in relation to a tax upon the *privilege of using tangible personal property* in this State, to make appropriations to the Department of Revenue and to the Secretary of State in connection therewith and to make certain incidental but necessary corollary changes as an enforcement aid in the Uniform Motor Vehicle Anti-Theft Act, approved May 11, 1933, as amended, by amending Section 4 of said Uniform Motor Vehicle Anti-Theft Act." It is attacked under section 13 of article IV of the constitution on the grounds (1) that it includes two subjects, (2) that its title does not express the subject matter of the act and (3) that it introduces a new subject into the Uniform Motor Vehicle Anti-Theft Act. So far as we can ascertain, the validity of a title that describes the provisions of an independent piece of legislation and also expressly amends an existing act has not been passed on by this court. The adjustments necessary to fit a new statute into the existing legislative scheme have heretofore been made by companion bills. In the only case

that we are aware of that involved a statute in which a similar technique was used, (*Routt* v. *Barrett*, 396 Ill. 322,) the present question was not raised.

Section 13 of article IV provides: "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed; and no law shall be revived or amended by reference to its title only, but the law revived, or the section amended, shall be inserted at length in the new act." This requirement prevents logrolling, and by limiting the contents of a bill to a single subject it outlaws legislative "riders," and so protects the veto power of the Governor against encroachment. 1 Debates and Proceedings of Illinois Constitutional Convention, (1870) p. 536; *St. Louis* v. *Tiefel*, 42 Mo. 578; *Commonwealth V. Barnett*, 199 Pa. 161, 48 Atl. 976.

We think that it is clear that all of the provisions of the act deal with a single subject,—the imposition of a use tax,—which is clearly expressed in its title. Appropriations to enforce the act are germane to that subject. The amendment to section 4 of the Uniform Motor Vehicle Anti-Theft Act provides that the Secretary of State shall not issue a certificate of title for a motor vehicle unless the applicant furnishes a receipt showing that the use tax has been paid, or establishes that no tax is due. Such a provision is obviously relevant to the enforcement of the use tax.

But it is also argued that the Uniform Motor Vehicle Anti-Theft Act, as it stood before the amendment to section 4, dealt with a subject entirely unrelated to any tax, and that the amendment introduces into that act extraneous matter that is foreign to its title. The title of the Uniform Motor Vehicle Anti-Theft Act (Ill. Rev. Stat. 1955, chap. 95½,) is "An Act in relation to the prevention of the theft of

motor vehicles by requiring certificates of title for registered motor vehicles and the licensing of dealers in used motor vehicles, trailers, semi-trailers and parts thereof." The new provision introduced by the amendment relates to the issuance of certificates of title by the Secretary of State and so it falls within the title of the act. Evidence that the use tax has been paid or is not due will also show from whom the car was acquired and so will aid the Secretary of State in ascertaining that it was legitimately acquired. The legislative technique here used invites close scrutiny. It has an inherent potential that, if not closely confined, would trespass upon the objections of the constitutional provision. In this instance, however, the provision in question is germane both to the new statute and to the statute that is amended, and so it does not conflict with the constitution.

Plaintiff's remaining objections can be shortly stated and shortly disposed of. A purchaser who does not pay the tax to a retailer is required, under penalty, to file a return with the Department of Revenue. The statute does not prescribe the form of a return, and does not in so many words authorize the Department to do so, and plaintiff argues that it therefore violates the due process clause. There is little room for debate as to what is to be contained in a return under the act. The authority of the Department to administer the act is expressly stated in many of its provisions, and it is implicit throughout all of them. That authority is adequate to authorize the Department to prescribe a form of return.

Section 12 of the act incorporates, by reference to their numbers and to the subjects with which they deal, sixteen sections of another statute, but does not identify by title the statute that contains the sixteen sections. Plaintiff argues that the act is therefore fatally vague and indefinite. The argument is without merit because section 12 makes it

unmistakably clear, by capsule references to the matters dealt with in the incorporated sections, that those sections are in the Retailers' Occupation Tax Act. And even without the references to specific subjects, a reading of the statute as a whole would remove any reasonable doubt.

In our opinion the circuit court properly sustained the validity of the statute, and its decree is affirmed.

Decree affirmed.

Mr. JUSTICE DAVIS, dissenting:

I voice my dissent to what I believe to be an unprecedented opinion by the majority. My conclusion is neither predicated on the wisdom or folly of the legislation, nor on what the majority describes as its "cumbersome" methods, but rather is based on the conviction that the legislature has failed to enact a valid, uniform privilege tax within the limitations of the revenue article of our constitution. Const., art. IX, secs. 1 and 2.

If I interpret the decision correctly, the majority implicitly concede that the Use Tax Act, if it stood alone, would be unconstitutional for lack of uniformity, but find justification for this lack of uniformity in the legislature's purpose to protect the base of the retailers' tax. Indeed it appears that the majority's decision is based on the assertion that "a protective tax can depend for its justification upon the tax that it supports."

I can find nothing in the revenue article nor in our decisions to indicate that a general protective purpose will render a tax immune to constitutional objections. The majority point to the tax on gifts in contemplation of death as one enacted for the purpose of protecting the base of the State inheritance tax. But I know of no case, including those cited by the majority, which indicates that such a protective tax could be upheld regardless of its uniformity, or without being a tax upon a privilege. Thus, the majority

opinion holds that while the legislature could not constitutionally enact the present use tax standing alone, since it first enacted a valid retailers' tax, with classifications peculiar to that occupation, it may now protect that tax by enacting a use tax without regarding constitutional requirements. Under this pronouncement, if the retailers' tax were repealed or substantially changed, those who use property in Illinois would be subjected to a clearly non-uniform and discriminatory tax. Such an objection was sufficient to strike down the Motor Vehicle Use Tax Act in *People ex rel. Schoon* v. *Carpentier*, 2 Ill.2d 468, at 475-476, where we held: "It is contended that this tax is similar to that in the Cigarette Use Tax Act and that the act is valid as levying a complementary tax to that levied by the Retailers' Occupation Tax Act. Our decision in *Johnson* v. *Halpin*, 413 Ill. 257, is cited in support of this contention. That case can offer no such support as it is evident that there is a salient difference between the Motor Vehicle Use Tax Act and the Cigarette Use Tax Act. A review of the statutes will reveal that the former (by the Secretary's construction) provides for no general tax upon all users of motor vehicles in this State. If the Retailers' Occupation Tax Act were repealed or substantially changed those who bought motor vehicles from Illinois dealers would escape the burden of this use tax. However, as pointed out in *Johnson* v. *Halpin*, 413 Ill. 257, the cigarette use tax is a tax on the local use of cigarettes and in no way discriminates against purchasers who buy their cigarettes outside of the State, since they pay the same tax as purchasers from Illinois distributors."

Nor can the majority find precedent in *Johnson* v. *Halpin*, 413 Ill. 257, upholding the Cigarette Use Tax Act. In that case we pointed out that the operation of the act was uniform and nondiscriminatory among all users of cigarettes, and stated at page 270: "Therefore, a taxable privilege may involve lawful rights and conduct enjoyed

without previous legal authority, but over which the legislature has some power of control or classification. A tax upon such rights would be valid provided the classification were reasonable, and the statute provided for uniformity among the constituents of the class. *Harder's Storage Co.* v. *City of Chicago*, 235 Ill. 58." We also stated at page 271: "However, as a privilege tax it must still conform to the constitutional requirements of uniformity as to the class upon which it operates." That opinion further recited that the cigarette use tax was levied upon the privilege of using cigarettes in this State, a privilege which the State could control or abolish, and I believe that fact as well as the complementary nature of the act, persuaded the court to sustain the constitutionality of the enactment.

Section 1 of the revenue article requires that a privilege tax must be "uniform as to the class upon which it operates." (Const., art. IX, sec. 1.) The provisions of section 2 of article IX have never been thought to eliminate this requirement. In *Ohio Oil Co.* v. *Wright*, 386 Ill. 206, 220, we stated: "We have held that these two provisions do not prevent the legislature from placing a tax on some other business or occupation than that specifically enumerated in section 1. (*Winter* v. *Barrett*, 352 Ill. 441; *Bachrach* v. *Nelson*, 349 Ill. 579; *Bessette* v. *People*, 193 Ill. 334.) However, such tax must be uniform as to the class upon which it operates, as is expressly provided by the constitution. A tax upon the occupation of producing oil is just as logical and valid a classification as is the occupation of engaging in the retail sale of tangible personal property for use or consumption, but like that tax it must operate uniformly upon a class. The designation of the persons composing a class may not be arbitrary or capricious, and uniformity may be violated by including those in fact not within the class, (*Banghart* v. *Walsh*, 339 Ill. 132; *Wedesweiler* v. *Brundage*, 297 Ill. 228; *Scully* v. *Hallihan*, 365 Ill. 185; *Svithiod Singing Club* v. *McKibbin*,

381 Ill. 194,) as well as by excluding those properly within it. *Lippman* v. *People*, 175 Ill. 101; *Winter V. Barrett*, 352 Ill. 441; *City of Chicago* v. *Ames*, 365 Ill. 529."

But the majority has now announced that the legislature may disregard uniformity and all other constitutional limitations provided the tax has the purpose of protecting another tax. The scope of this newly declared legislative taxing power is far beyond the constitutional proscriptions heretofore recognized.

The majority announced a further dangerous doctrine in sloughing off plaintiff's objection to the subclassification of the sale of personal property in connection with sales of real estate or building contracts. It stated that "If there is vice in the provision as it appears in the Retailers' Occupation Tax Act, the attack should be directed at that act, and not at the statute designed to complement it." Thus, a taxpayer is denied the right to constitutionally attack a void requirement of a complementary act, when the principal statute contains a similar invalid provision. This is, to the best of my knowledge, the first pronouncement by this court of this novel legal principle, which I regard as voliative of the constitutional rights of the plaintiff.

While sustaining the use tax because of its complementary character, the majority permit that tax to actually raise the base of the retailers' tax. The retailers' tax base is on "gross receipts" which excludes credit given for property taken in trade. The use-tax base is the selling price which disregards the value of such "trade-ins." Under the majority interpretation, the use tax increases the tax on all "trade-in" transactions, while not affecting the retailers' tax on "non-trade-in" transactions. This result obtains since the retailer is excused from remitting the use tax that he collects only to the extent that he remits the retailers' tax with respect to the same transaction. Thus, retailers will be

required to pay a tax based on the full value of the article sold, without excluding therefrom the value of any merchandise "traded in." The majority ignores the fact that, with respect to the tax increase on these transactions, the tax is not complementary but is entirely new.

The effect of the majority decision seems to be that once a tax is enacted for the general purpose of protecting a prior tax the subsequent tax (1) need not meet constitutional limitations, (2) cannot be constitutionally attacked if it complements similar provisions of the prior act, and (3) can go further than protection and can create an entirely new tax.

While the purpose of the use tax may be desirable, it can be justified only as a tax on a privilege; and it must therefore be uniform as to the class on which it operates. I am convinced that the classifications and exemptions of the Use Tax Act do not comply with the requirement of uniformity (*City of Chicago* v. *Willett Co.* 1 Ill.2d 311; *Johnson* v. *Halpin,* 413 Ill. 257; *Winter* v. *Barrett,* 352 Ill. 441;) and that it must stand or fall on its own merits. *People ex rel. Schoon* v. *Carpentier,* 2 Ill.2d 468.

I am mindful of the limitations of our revenue article, and the ever increasing monetary needs of government, but the exigencies of the situation offer no reason for this court to approve this legislation. While, with some misgivings, I concede that this is a tax upon a privilege within the meaning of the revenue article, I must dissent from the doctrine that a complementary or protective tax is exempt from the provisions of our basic charter. The majority decision has effectively removed many of the basic constitutional limitations on the taxing power. If this is to be done, it should be by a well considered constitutional amendment and not by fiat of this court.

APPENDIX D

PERTINENT PROVISIONS OF ILLINOIS USE TAX ACT

Sec. 3 is as follows:

"Sec. 3. A tax is imposed upon the privilege of using in this State tangible personal property purchased at retail on and after August 1, 1955, from a retailer. Until and including June 30, 1957, such tax is at the rate of 2½% of the selling price of such property; and after June 30, 1957, at the rate of 2% of such selling price.

The tax hereby imposed shall be collected from the purchaser by a retailer maintaining a place of business in this State or a retailer authorized by the Department pursuant to Section 6 hereof, and remitted to the Department, pursuant to the provisions of Section 9 hereof.

The tax hereby imposed and not paid to a retailer pursuant to the preceding paragraph of this Section shall be paid to the Department directly by any person using such property within this State, pursuant to the provisions of Section 10 hereof.

Retailers shall collect the tax from users by adding the tax to the selling price of tangible personal property, when sold for use, in the manner prescribed by the Department. The Department shall have the power to adopt and promulgate reasonable rules and regulations for the adding of such tax by retailers to selling prices by prescribing bracket systems for the purpose of enabling such retailers to add and collect, so far as practicable, the amount of such tax.

The tax herein imposed shall not apply to the State of Illinois, any county, political subdivision or municipality thereof, or to any instrumentality or institution of any of the governmental units aforesaid, or to any corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious or educa-

tional purposes, when using tangible personal property purchased at retail.

To prevent actual or likely multistate taxation, the tax herein imposed shall not apply to the use of tangible personal property in this State under the following circumstances:

(a) The use, in this State, of tangible personal property acquired outside this State by a non-resident individual and brought into this State by such individual for his or her own use while temporarily within this State or while passing through this State;

(b) the use, in this State, of tangible personal property which, is acquired outside this State and which is moved into this State for use as rolling stock moving in interstate commerce;

(c) the use, in this State, of tangible personal property which is acquired outside this State and caused to be brought into this State by a person who has already paid a tax in another state in respect to the sale, purchase or use of such property, to the extent of the amount of such tax so paid in such other state;

(d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State or physically attached to or incorporated into other tangible personal property that is used solely outside this State.

If the seller of tangible personal property for use would not be taxable under the Retailers' Occupation Tax Act despite all elements of the sale occurring in Illinois, then the tax imposed by this Act shall not apply to the use of such tangible personal property in this State."

Sec. 9 is as follows:

"Sec. 9. Each retailer required or authorized to collect the tax herein imposed shall pay to the Department the amount of such tax (except as otherwise provided), on or before the 15th day of the month following the calendar month during which such tax was collected. The first such remittance shall be due on or before September 15, 1955, for the tax collected during the preceding calendar month, but a retailer need not remit that part of any tax collected by him to the extent that he is required to remit and does remit the tax imposed by the Retailers' Occupation Tax Act with respect to the sale of the same property.

Where such tangible personal property is sold under a conditional sales contract, or under any other form of sale wherein the payment of the principal sum, or a part thereof, is extended beyond the close of the month for which the return is filed, the retailer, in collecting the tax (except when such a procedure would make compliance with Section 4 of the Uniform Motor Vehicle Anti-Theft Act, approved May 11, 1933, as amended, impossible or impracticable), may collect, for each month, only the tax applicable to that part of the selling price actually received during such month.

On or before the 15th day of each month, such retailer shall also file a return for the preceding calendar month, the first such return being due by September 15, 1955, covering the preceding calendar month.

Where a retailer collects the tax with respect to the selling price of tangible personal property which he sells and the purchaser thereafter returns such tangible personal property and the retailer refunds the selling price thereof to the purchaser, such retailer shall also refund, to the purchaser, the tax so collected from the purchaser. When filing his return for the month in which he refunds such tax to the purchaser, the retailer may deduct the amount of the tax so refunded by him to the purchaser

from any other use tax which such retailer may be required to pay or remit to the Department, as shown by such return, provided that the amount of the tax to be deducted shall previously have been remitted to the Department by such retailer. If the retailer shall not previously have remitted the amount of such tax to the Department, he shall be entitled to no deduction hereunder upon refunding such tax to the purchaser.

Any retailer filing a return hereunder shall also include (for the purpose of paying tax thereon) the total tax covered by such return upon the selling price of tangible personal property purchased by him at retail from a retailer, but as to which the tax imposed herein was not collected from the retailer filing such return, and such retailer shall remit the amount of such tax to the Department when filing such return.

If experience indicates such action to be practicable, the Department may prescribe and furnish a combination or joint return which will enable retailers, who are required to file returns hereunder and also under the Retailers' Occupation Tax Act, to furnish all the return information required by both Acts on the one form.

Where the retailer has more than one business registered with the Department under separate registration hereunder, such retailer shall not file each return that is due as a single return covering all such registered businesses, but shall file separate returns monthly for each such registered business.

In his return, the retailer shall determine the value of any consideration other than money received by him in connection with the sale of any tangible personal property in the course of his business and he shall include such value in his return. Such determination shall be subject to review and revision by the Department in the manner hereinafter provided for the correction of returns.

All moneys received by the Department hereunder shall be paid into the General Revenue Fund of the State Treasury."

APPENDIX E

In each of the following states an exemption is given from the use tax as to purchases made within the state imposing the tax. The tax in these states is only imposed upon a purchaser buying property outside the state and then bringing it into the state.

Alabama (Sec. 789 Art. 11 Title 51, Code of 1940); Arkansas, (Sec. 84-3106 Ch. 31 Statutes of 1947 as amended 1949); Colorado, (Sec. 138-6-34 Ch. 138 Colorado Revised Statutes); Iowa, (Sec. 423.4 Ch. 423 Iowa Code Annotated); Kansas, (Sec. 79-3704 Art. 37 Ch. 79 General Statutes of Kansas Annotated); Michigan, (Sec. 205.94 Ch. 205 Compiled Laws of Michigan); Mississippi, (Sec. 10146-04 Division 3 Ch. 3 Mississippi Code); New Mexico, (Sec. 72-17-4 Art. 17 Ch. 72, New Mexico Statutes); North Dakota, (Sec. 57.4003 Ch. 57-40 North Dakota Revised Code); Ohio, (Sec. 5741.02 Ch. 5741 Page's Ohio Revised Code); Oklahoma, (Sec. 1310C Title 68, Oklahoma Statutes Annotated); Rhode Island, (p. 228 Acts and Resolves, 1947); South Carolina, (Sec. 65-1422 Ch. 15 Code of Laws South Carolina); South Dakota, (Sec. 57.4304 Ch. 57.43 South Dakota Code); West Virginia, (Sec. 999 (30C) Art. 15-A Ch. 11 West Virginia Code); Wyoming, (Sec. 32-2604 Ch. 32 Wyoming Compiled Statutes).

In each of the following states the use tax is due upon a domestic purchase only where the sales or retailers' tax upon the same transaction is not paid:

California, (Sec. 6401, Revenue and Taxation Code); Maryland, (Sec. 370 Art. 81 Annotated Code of Maryland); Nevada, (Sec. 372.345 Title 32 Ch. 360 Nevada Revised Statutes); North Carolina, (Sec. 105-220 Art. 8 Ch. 105 General Statutes North Carolina); Utah, (Sec. 59-16-4 Titles 59 Utah Code Annotated); Washington, (Sec. 82.12.030 Ch. 82.12 Revised Code Washington); Pennsyl-

vania, (Sec. 3403-201 Art. II Title 72 Purdon's Pennsylvania Statutes Annotated).

In Tennessee both a sales tax and a use tax are imposed by the same section of the statute (Sec. 67-3003 Title 67 Tennessee Code Annotated). The sales tax is imposed at the rate of 2% of the sales price of property when sold at retail "in this state." The use tax is imposed "at the rate of two per cent of the cost price of each item or article of tangible personal property when the same *is not sold* but is used, consumed, distributed or stored for use and consumption *in this state.*" (Italics supplied.) In defining the term "use tax" as used in the statute the Tennessee Supreme Court limits the tax to the privilege of bringing property into the state from without the state (*Broadacre Dairies v. Evans,* 193 Tenn. 441, 246 S.W. (2) 78-79, 1952).

In Florida, Louisiana and Georgia, use taxes are imposed in nearly the identical language as that just quoted from the Tennessee Code (Florida, Sec. 212.05 Ch. 212 Florida Statutes Annotated; Louisiana, (Sec. 47.302 Title 47 Louisiana Revised Statutes), Georgia, (Sec. 92-3402-A Title 92, Code of Georgia).

Maine has a combined sales and use tax. (Secs. 3-4 Ch. 17 Revised Statutes of Maine.) Sec. 4 provides that every person purchasing property at retail shall be liable for the use tax until he has paid it or taken a receipt from the seller "showing that the *seller has collected the sales or use tax in which case the seller shall be liable for it.*" (Italics supplied.) The Sales and Use Tax Law is one upon the retailer instead of the consumer with a limited right to pass the tax along to the consumer. (*W. S. Libbey Co.* v. *Johnson,* 148 Maine 410, 94 At. (2) 907; *Maine* v. *Hiscock,* 107 At. (2) 421. While both a sales tax and a use tax are imposed there is but one tax due. This is made manifest by Sec. 4 which imposes the use tax and provides, "Every